

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0468

Use Tax

Calendar Years 1992, 1993, 1994

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Gross Retail Tax - Rental Garments

Authority: IC 6-2.5-4-10

Taxpayer protests the imposition of use tax on rental garments.

II. Gross Retail Tax - Promotional Items

Authority: IC 6-2.5-3-2; IC 6-2.5-3-4; 45IAC 2.2-5-61; Information Bulletin #40

Taxpayer protests the imposition of use tax on promotional items included in packaging for which no charge is made.

III. Gross Retail Tax - Utilities

Authority: 45IAC 2.2-4-11

Taxpayer protests the imposition of use tax on utilities including electric, water, and gas.

IV. Tax Administration - Interest

Authority: IC 6-8.1-10-1

Taxpayer protests the imposition of interest.

V. Tax Administration-Penalty

Authority: IC 6-8.1-10-2.1(d); 45IAC 15-11-2

Taxpayer protests the imposition of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation incorporated on October 9, 1969 and domiciled in Indiana. Taxpayer sells lawn and garden equipment, chain saws, trimmers, miscellaneous parts and accessories. Taxpayer also has a repair shop and service department. On July 1, 1994, the business was sold to taxpayer's son and is operated as Newby's Implement Service, Inc.

Taxpayer states it manufactures dozer blades for tractors, wheel horses, power lawn vacuums, and various custom built items and was originally granted a one hundred percent (100%) exemption for gas, electric, and water utilities.

I. Gross Retail Tax - Rental Garments

DISCUSSION

Taxpayer protests the use tax on rental garments and avers they should not be taxable, as they are not his property.

IC 6-2.5-4-10(a) states:

A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person.

In addition, 45IAC 2.2-5-8 states:

Because of the lack of an essential and integral relationship with the integral production system.... The following items are not exempt:

Clothing or other equipment furnished to workers that are primarily used for workers' comfort and convenience.

FINDING

The taxpayer's protest is denied. Rental garments issued to employees for their convenience and comfort are taxable.

II. Gross Retail Tax - Promotional Items

DISCUSSION

Taxpayer protests the imposition of use tax on promotional items inserted in packaging before shipment and for which no charge is made.

Historically, the Department has taken the position that whenever a person, company, or organization gives away merchandise or other tangible personal property, such organization becomes the ultimate consumer for sales tax purposes. See Information Bulletin #10.

FINDING

Taxpayer's protest is denied. The taxpayer failed to self-assess use tax on clearly taxable promotional items.

III. Gross Retail Tax - Utilities

DISCUSSION

Taxpayer protests the imposition of use tax on electric, water, and gas utilities based upon a Department audit, which revealed the taxpayer's one hundred percent (100%) exemption was incorrect.

a.) Electric utility....Taxpayer states the auditor, Dave Cook, agreed to exempt sixty percent (60%) in 1992 and 1993 and twenty percent (20%) in 1994 but the audit was already billed. In a telephone conversation with Dave Cook regarding the issue, he states no such statement was made and the taxpayer does not manufacture, but services various machinery, mainly lawn tractors.

b.) Water utility...Taxpayer states the water is used to wash parts and uses cleaning soaps before painting steel.

c.) Gas utility...Taxpayer states the gas is used to heat the manufacturing and non-manufacturing areas.

IC 6-2-5-5.1 states:

(a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas, water, steam, and steam heat. Transactions involving tangible personal property are exempt from the state gross retail tax

if the person acquiring the property acquires it for direct consumption as a materiel to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture.

IC 6-2.5-5-5.1 only exempts utility service to the extent that it is directly consumed in direct production. Taxpayer is not a manufacturer but a service and repair shop therefore no exemption is afforded.

FINDING

Taxpayer's protest is denied.

IV. Tax Administration - Interest

DISCUSSION

Taxpayer protests the interest assessed.

Interest, under IC 6.8-1-10-1 may not be waived.

FINDING

The taxpayer's protest is denied. The department has no authority to waive interest.

V. Tax Administration-Penalty

DISCUSSION

The taxpayer protests the imposition of a negligence penalty but does not provide support.

A review of the audit file indicates the taxpayer made no effort to self-assess use tax on clearly taxable items. A negligence penalty may be imposed under IC 6-8.1-10-2.1 and 45 IAC 15-11-2 (c) if the taxpayer does not exercise ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed.

The taxpayer did not show reasonable cause for failing to self-assess use tax.

FINDING

The taxpayer's protest is denied. The taxpayer failed to self-assess use tax on clearly taxable items and no use tax accrual system is in place.

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CONCLUSION

Taxpayer's protest is denied for all five issues.